In the Matter of the Compensation of
ISAAC R. MARHOLIN, Claimant
WCB Case No. 22-03081
ORDER ON REVIEW
Jodie Phillips Polich, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Curey and Ceja.

Claimant requests review of Administrative Law Judge (ALJ) Cordes's order that affirmed an Order on Reconsideration that did not award permanent disability benefits for his left shoulder strain condition. On review, the issue is extent of permanent disability (permanent impairment). We affirm.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" with the following summary and supplementation.

In June 2021, claimant injured his left shoulder at work while helping move a patient in bed. (Ex. 1).

On August 11, 2021, the SAIF Corporation accepted an injury claim for a disabling left shoulder strain. (Ex. 10).

On November 22, 2021, Dr. Ballard examined claimant at SAIF's request. (Ex. 20). Dr. Ballard diagnosed a resolved left shoulder strain, preexisting rotator cuff tendinopathy, preexisting left acromioclavicular arthritis, and left upper extremity myofascial pain. (Ex. 20-8). Dr. Ballard opined that claimant's work injury combined with preexisting tendinopathy and arthritis and that the work injury was no longer the major contributing cause of disability or need for treatment of the combined condition by September 2021. (Ex. 20-9).

On December 6, 2021, Dr. Wilson, claimant's attending physician, noted that claimant continued to have pain in his posterior left shoulder, radiating to his lower cervical spine and his middle finger. (Ex. 21-1). Dr. Wilson reviewed Dr. Ballard's report and agreed with Dr. Ballard's determination that the accepted shoulder strain was medically stationary and that claimant did not have any permanent impairment or permanent work restrictions. (Ex. 21-3). Subsequently, Dr. Wilson signed a concurrence opinion agreeing with the diagnoses, work

capacities, and medically stationary date in Dr. Ballard's November 2021 report. (Ex. 22). Dr. Wilson also concluded that there was no permanent impairment due to claimant's accepted left shoulder strain and that any loss in range of motion of his left shoulder was due to conditions other than the accepted condition. (Ex. 23).

On February 9, 2022, SAIF issued a Notice of Closure that did not award any permanent disability benefits. (Ex. 29). Claimant requested reconsideration of the closure, challenging his entitlement to permanent disability benefits. (Ex. 30).

On June 1, 2022, Dr. Grunwald completed a medical arbiter examination. (Ex. 33). Dr. Grunwald found reduced range of motion and muscle strength loss in claimant's left shoulder. (Ex. 33-6).[1] However, he noted possible voluntary limitation during testing. (*Id*.) When asked whether the examination findings were valid for the purpose of rating impairment, Dr. Grunwald noted that claimant demonstrated significantly diminished range of motion of the left shoulder and significant hypersensitivity to light touch of the cervical spine, trapezius, and posterior shoulder, which was out of proportion to what would be expected from an injury that occurred a year prior. (*Id*.) He explained that there were serious concerns of potential voluntary limitations and somatoform overlay because there was significant hypersensitivity upon light touch that had not been noted in previous examinations. (*Id*.)

Relying on Dr. Grunwald's findings, the Appellate Review Unit (ARU), in an Order on Reconsideration, concluded that no permanent disability was awardable because the arbiter determined that claimant's impairment findings were invalid. (Ex. 34). Claimant requested a hearing.

CONCLUSIONS OF LAW AND OPINION

The ALJ determined that Dr. Grunwald's findings lacked clear and concise reasoning. Accordingly, the ALJ reasoned that the findings of claimant's attending physician, Dr. Wilson, were more accurate and should be used to rate impairment.

[1] On page 4, paragraph 3 of the ALJ's order, we replace "Dr. Grunwald opined that all of the conditions except for the right shoulder strain were related to the work injury" with "Dr. Grunwald opined that all of the conditions except for the left shoulder strain were unrelated to the work injury".

Although Dr. Grunwald stated that claimant's "right shoulder strain industrial injury June 20, 2021 resolved 12 weeks after initial injury," the examination focused on the left shoulder, and both claimant and SAIF agreed that the work event dealt with the left shoulder. (Exs. 1, 2, 5, 10, 33-6). Therefore, we interpret Dr. Grunwald's statement as referencing the accepted left shoulder strain, not a right shoulder strain.

Because Dr. Wilson did not attribute any impairment findings to the accepted condition, the ALJ affirmed the reconsideration order that did not award permanent impairment.

On review, claimant asserts that Dr. Grunwald's findings should be used to rate impairment. He further contends that Dr. Grunwald's findings were valid and that he is entitled to permanent disability benefits based on the those findings. Based on the following reasoning, we affirm the ALJ's order.

Claimant has the burden of establishing the nature and extent of his disability. *See* ORS 656.266(1); *Marisela Johnson*, 67 Van Natta 1458, 1461 (2015). As the party challenging the Order on Reconsideration, it is claimant's burden to establish error in the reconsideration process. ORS 656.283(6); *Marvin Wood Prods. v. Callow*, 171 Or App 175, 183 (2000); *Javon L. Washington*, 72 Van Natta 200, 200 (2020).

Where, as here, a medical arbiter is used, impairment is established based on the medical arbiter's findings, except where a preponderance of the medical evidence demonstrates that different findings by the attending physician, or impairment findings with which the attending physician has concurred, are more accurate and should be used. *See* OAR 436-035-0007(5); *SAIF v. Owens*, 247 Or App 402, 414-15 (2011), *recons*, 248 Or App 746 (2012). Absent persuasive reasons to the contrary, we are not free to disregard a medical arbiter's findings. *See Hicks v. SAIF*, 194 Or App 655, 659, *recons*, 196 Or App 146 (2004); *Washington*, 72 Van Natta at 200.

Only findings of impairment that are permanent and caused by the accepted condition or direct medical sequela of the accepted condition may be used to rate impairment. *See* OAR 436-035-0006(1); OAR 436-035-0007(1); OAR 436-035-0013(1); *Khrul v. Foremans Cleaners*, 194 Or App 125, 130-31 (1994). A worker is not eligible for an impairment award if the loss of use or function of a body part or system is not caused in material part by the compensable injury. *See* ORS 656.214(1)(a); OAR 436-035-0007(1)(a); *Robinette v. SAIF*, 369 Or 767, 782-83 (2022).

Here, Dr. Grunwald, the medical arbiter, persuasively explained that claimant demonstrated significantly diminished range of motion and hypersensitivity on examination which was out of proportion to what would be expected from an injury that occurred a year before. (Ex. 33-6). In response to the ARU's query asking for specific reasoning as to whether claimant's

impairment findings were considered valid, Dr. Grunwald gave a detailed explanation regarding "serious concerns" of claimant's potential voluntary limitations, somatoform overlay, and hypersensitivity that was out of proportion to the nature of claimant's injury. (*Id.*) Thus, while Dr. Grunwald did not explicitly state that claimant's examination findings were invalid, we find that the record reflects that Dr. Grunwald considered the findings to be invalid. *See Anthony J. Dasis*, 74 Van Natta 319, 420 (2022) (self-limited motions, with accompanying pain behaviors, invalidated the claimant's impairment findings); *Robin R. Jorgensen*, 72 Van Natta 179, 181 n 3 (2020) (the claimant's examination findings were invalid because of the claimant's poor, inconsistent effort).

Under such circumstances, Dr. Grunwald's invalid findings do not support a conclusion that any impairment was caused in material part by the compensable injury.[2] *See* ORS 656.214(1)(a); OAR 436-035-0007(1), (5); OAR 436-035-0006(1); *Gramada v. SAIF*, 326 Or App 276, 284 (2023) (the claimant was not entitled to a permanent impairment award where no impairment findings were caused in material part by the accepted condition); *John L. Payne*, 70 Van Natta 82, 86 (2018) (no award of permanent impairment where the medical arbiter explained that the impairment findings were invalid and not due to the accepted condition).

In the alternative, even if we relied on the impairment findings of Dr. Wilson, claimant's attending physician, he opined that there was no permanent impairment due to claimant's accepted shoulder strain and any loss of shoulder range of motion was due to conditions other than the accepted condition. (Ex. 23). Thus, because Dr. Wilson's findings do not support a conclusion that any impairment was caused in material part by the compensable injury, claimant would not be eligible for an impairment award. *See Robinette*, 369 Or at 782-84; *Gramada*, 326 Or App at 284.

[2] SAIF requests that we take "administrative notice" of the ARU's notices and medical arbiter questions that were provided to Dr. Grunwald, in order to provide the Board with the "explicit wording of questions Dr. Grunwald *did not* answer." (Emphasis in original). *See Groshong v. Montgomery Ward Co.*, 73 Or App 43 (1985) (Board may take administrative notice of facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questions"); *Timothy C. Guild*, 68 Van Natta 741, 743 n 3 (2016) (Board may take administrative notice of agency orders involving the same claimant). Yet, as previously explained, the record reflects that Dr. Grunwald considered claimant's examination findings invalid. (Ex. 33). Therefore, we need not decide this issue because, even if we did, it would not affect the outcome of this dispute. *See James Hibbs*, 75 Van Natta 27, 27 n 1 (2023) (declining to take administrative notice of a Hearings Division order when doing so would not affect the outcome of the appeal).

Consequently, for the above reasons, we conclude that claimant has not established error in the reconsideration process. *See* ORS 656.283(6); *Callow*, 171 Or App at 183-84; *Washington*, 72 Van Natta at 200. Accordingly, we affirm.

ORDER

The ALJ's order dated February 21, 2023, is affirmed.

Entered at Salem, Oregon on August 24, 2023